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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 955

JOHN J. FELICE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 466-480; Pet. App. 54-71)[1] is reported at 311 F. 2d 934. The opinion of the district court (R. 443-449) is not reported.

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[1] The certified copy of the appendix prepared for the court below and supplemented with the proceedings in the Court of Appeals is designated "R". The separate volume of government trial exhibits is designated "Govt. Ex."

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1963 (R. 465). A petition for rehearing was denied on February 12, 1963 (R. 488). On March 8, 1963, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including March 29, 1963. The petition was filed on March 28, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the reversal of the conviction of one of two employer co-defendants for paying money to a representative of employees on the ground that it was not an "employer" within the meaning of the Taft-Hartley Act required a new trial as to petitioner, who was convicted of receiving money while acting as a representative of employees.

2. Whether the evidence supports the verdict.

3. Whether various rulings on the evidence were improper.

STATUTE INVOLVED

The Labor Management Relations Act, 1947, 61 Stat. 136, popularly known as the Taft-Hartley Act, provided in pertinent part:

Sec. 2. When used in this Act—

* * * *

(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, * * *

* * * * *

Sec. 302. (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

* * * * *

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

* * * *

STATEMENT

In a non-jury trial[2] in the District Court for the Northern District of Ohio, petitioner was convicted of having received money from an employer while a representative of his employees, in violation of Section 302 of the Labor Management Relations Act (R. 2-5; 443-449). He was sentenced to imprisonment for ninety days and fined $4,500 (R. 457). His conviction was affirmed on appeal. The court of

[2] Petitioner waived trial by jury.

appeals also affirmed the conviction of Pilsener Brewing Company and its president, George S. Carter, for paying the money.[3] City Products Corporation, of which Pilsener was a wholly owned subsidiary (and with which Pilsener merged after April, 1956), had also been convicted of making the payment but the court of appeals reversed as to it on the ground that, at the time of the pertinent transaction, April 17, 1956, City Products had no employees (R. 19, 473).

The evidence showed that petitioner was the president and business manager of Local 293 and represented certain employees of Pilsener Brewing Company (R. 14), of which George S. Carter, was president. Carter had negotiated a number of labor contracts with petitioner (R. 16, 178). On April 17, 1956, at the Pilsener office, Carter gave petitioner $4,500, a $4,000 check of the Cleveland Trust Company and $500 in cash (R. 269; Govt. Ex. 4, p. 31). Petitioner signed a ninety day promissory note at 3% interest payable to Carter (R. 269; Govt. Ex. 6, p. 36). Petitioner used the funds in connection with the purchase of two homes for $79,000 (R. 93-97).

The $4,000 check was obtained by Harold A. Nero, Controller of Pilsener, with a Pilsener Brewing Company check. Carter had told Nero he was going to lend Felice $4,000 and did not wish to give Felice

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[3] Subsequent to the affirmance by the court of appeals, co-defendant Carter made a motion in the district court for reduction of sentence under Rule 35, F. R. Crim. P., and his sentence was reduced from ninety days in jail (R. 456) to a fine of $1,500 (Pet. App. 78).

a Pilsener Brewing Company check (R. 25-26, 32). The $500 in cash was obtained out of "petty cash" (R. 33). Carter told Nero to keep the transaction confidential (R. 31).

By a closing entry on March 31, 1960, the $4,500 was charged off by the Pilsener division of City Products to a bad debt reserve (R. 53, 64-65). No efforts were made to collect the sum (R. 39, 71, 353, 385). Although written off on the books, the company did not claim a bad debt deduction for tax purposes (R. 359, 374).

Petitioner, in 1960, adjusted his 1956 tax return and paid income tax on the $4,500 (R. 121-142, Gov't. Ex. 23, p. 94).

At the trial, petitioner claimed that the $4,500 was a loan from his friend Carter (R. 267, 273-274), and that he did not know the funds came from Pilsener (R. 269; cf. 385).

ARGUMENT

1. Petitioner's claim that the reversal of the conviction as to City Products requires a reversal as to him (Pet. 12-16) is without merit. The ruling of the court of appeals with respect to City Products is sustainable on the sole ground that it had no employees represented by petitioner and hence was not an "employer" under the statute (Pet. App. 62-63). Obviously, this holding does not affect petitioner's guilt of illegally receiving money from Carter, who, as the agent of Pilsener, was an employer under the

statute, and whose conviction as an employer was upheld by the court of appeals.

The court of appeals, it is true, went on to hold that the evidence of Zeidler's approval of the transaction for City Products and that corporation's subsequent write-off of the advance as a bad debt was not sufficient to "justify an inference that Zeidler, at the time he gave his consent, knew that such loan was but a cover for an illegal payment to Felice" (Pet. App. 63). But, as the court of appeals itself concluded (declining to reverse the convictions of Pilsener, Carter and petitioner), it does not follow that Carter intended merely a loan; much less that petitioner viewed the payment as a loan, rather than a gift. And, of course, it is his own intention which is controlling as to petitioner's guilt. See *Arroyo* v. *United States*, 359 U.S. 419, 423-424.

2. As the court of appeals held, the evidence amply supports the conviction. It is unnecessary to reach the question whether the statute, before its 1959 amendment, applied to a loan (see Pet. 42-52). The district judge found that petitioner "never intended to repay the money received or any interest thereon" (R. 448). This conclusion is supported by petitioner's actions. He never made any payments of interest or principal on the money. When the transaction was discovered by Internal Revenue agents, petitioner paid income tax on the whole amount. Accordingly, there was sufficient evidence to support the conviction under the original statute for receipt of money from an employer.

Equally without merit is the contention that the element of willfulness was not established because the evidence did not affirmatively show that petitioner knew the money was coming from Pilsener, rather than from Carter as a personal loan (Pet. 35-41). All the circumstances of the case justify the conclusion that petitioner, in obtaining money from Carter, knew he was dealing with Carter in the latter's capacity as an officer of Pilsener, acting for the corporation. The money was paid at the Pilsener office. Carter was not only the president of Pilsener, "he was the sole official, boss of the Pilsener Brewing Company" (R. 20). In view of the numerous contracts negotiated between Carter and petitioner, there could be no serious doubt that petitioner knew he was dealing with an employer when he sought money from Carter.

Petitioner argues (Pet. 25-29) that under the statute as it read at the time of the offense Carter must be distinguished from Pilsener. The legislative history of the 1959 amendment cited by petitioner (Pet. 25-26) seems to indicate primarily an intent to facilitate proof. But, in any event, the evidence here plainly supports the finding that Carter, the president of Pilsener, was "acting as an agent of an employer, directly or indirectly," within the purview of the original Act. § 2 (*supra*, p. 3).

3. At the beginning of the trial, when evidence was offered as to the write-off by City Products, counsel objected on various grounds. The court ruled that it would accept the evidence and that if the

evidence was not connected with a particular defendant, the court would ignore it with respect to that defendant (R. 51-52). When the government rested, defense counsel requested the court to make rulings, noting that "your Honor has reserved rulings with respect to a number of details" (R. 199-200). The government suggested that the court should not be asked to rule on the evidence piece by piece with no guidance from counsel (R. 200). Defense counsel stated they were prepared to offer guidance (R. 201), but pursuit of this problem was abandoned in subsequent discussion and never specifically renewed (R. 201-204).

Petitioner does not now point to any particularized objection to competency or admissibility of specific evidence as to which ruling was deferred. Rather, he complains generally about the trial judge's practice of deferring ruling and his failure to ultimately dispose of the objection. But, as the judge noted in his initial ruling (R. 51-52), the government must start somewhere in its proof, and evidence which does not immediately seem relevant may become so later, as the case unfolds (see R. 29, 51). Under these circumstances, and in the absence of a jury, it was proper to defer ruling and reasonable to expect each defendant to specify, at the end of the government's case, the evidence which was claimed not to relate to him. Having failed to make that specification, petitioner cannot complain. Moreover, there is still no indication that incompetent evidence was admitted against him.

Petitioner also claims that it was error to admit Form 870 and the related evidence of his payment of income tax on the $4,500 received from Carter. (Pet. 30-35). However, all factual evidence showing how the parties considered this transaction was competent evidence relevant to the issue of intent, which, of course, must be shown by circumstantial evidence. The waiver form, as such, was of no importance. It came in as part of the total evidence that in 1960 the $4,500 was treated by petitioner as money received and not as a loan, an important issue if loans were not covered by the statute under which he was charged.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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